UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

E.K. REALTY, LLC and
MORNING DUN ASSOCIATES CORPORATION [1]

Employer,

and **CASE NO. 2-RC-22140**

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 32E, AFL-CIO,

Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Lauri Kaplan, a hearing officer of the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2. Upon the entire record[2] in this proceeding, it is found that:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that Morning Dun Associates Corporation, (Morning Dun), a domestic corporation, owns a residential facility located 595 East 170th Street, Bronx, New York, (the Employer's facility), the sole facility involved herein. The parties further stipulated that E.K. Realty, LLC (herein EK), a New York corporation, with an office located at 301 Eighth Avenue, is engaged in the management of apartment buildings, including the Employer's facility. Annually, in the course and conduct of its business operations EK derives revenues in excess of $500,000 and purchases and

[1] Reflecting the name of the Employer as amended at hearing.

receives goods valued in excess of $5,000 directly from suppliers located outside the State of New York. The parties further stipulated that EK and Morning Dun (collectively referred to as the Employer) are joint employers of the employees working at the Employer's facility. Based upon the record and the stipulations of the parties, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The parties stipulated, and I find, that Local 32E, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks an election to represent a unit comprised of all building service employees employed by the Employer at its facility located at 595 East 170th Street, Bronx New York excluding guards and supervisors as defined in the Act. The Employer contends that the petitioned-for is not an appropriate unit for the purposes of collective bargaining as it consists of only the building superintendent, and thus as a one-person unit is sought, the petition should be dismissed.

The record establishes that Morning Dun has owned and operated a residential apartment building located at 595 East 170th Street, Bronx, New York for a lengthy period of time. EK became the managing agent for the building in February 1999. EK is operated by Jacob Eisenstein and Moshe Katz, his partner. Prior to retaining the

[2] A brief was filed by the Employer and has been duly considered.
[3] At the outset of the hearing, Petitioner sought to name Morning Dun owner Charles Aronowitz as an employer herein. The record contains scant evidence as to his status and is insufficient to establish that he is either an alter ego or joint employer with the other named employers. Thus, I find that that the record is not sufficient to establish that Aronowitz, in an individual capacity, is an employer within the meaning of the Act.

services of EK, the building was primarily managed by Morning Dun's owner, Charles Aronowitz, together with his assistant "Jackie" (LNU).[4] Morning Dun has a collective-bargaining agreement with the Factory Building Employees Union Local 187 which is effective from February 1, 1997 through January 31, 2000, and covers the facility in question[5].

Ramon Morales (Morales) has been the superintendent of the building since sometime in 1996. His job responsibilities include snow removal, maintenance of the building's boiler, handling tenant complaints, ordering heating oil, general building maintenance, installation of window guards and smoke detectors and minor repairs. He is assisted in the maintenance of the building by a porter, and this position is currently occupied by his brother, Roberto Morales (Roberto). Morales testified that when he was initially hired he informed Aranowitz that there was too much work in the building for one person and he would have to have assistance. Aranowitz told Morales to find someone to assist him and he would give him an additional $50.00 per week for the helper. According to Morales, Aronowitz told him to get "anybody." At the time he was hired, Morales signed an agreement that states, in part: "Ramon Morales will be responsible to supply his own helper that will clean garbage, and maintain the building clean, and assist him in the building."

The first porter to assist Morales was an individual named Lewis Pecada. Although the record is not clear in this regard it appears as though, for the most part, Aronowitz issued two checks, both payable to Morales, one for his weekly salary and the other designated as compensation for the porter. Pecada left the position after about one year, and Morales was instructed to find someone else for the job. After some difficulty,

[4] Neither Aronowitz nor Jackie testified at the hearing.
[5] There is no contention here that the petition was untimely filed. Notice was given to the incumbent local, as noted below, but no representative of the incumbent union appeared at the hearing.

he hired Edgar Padilla, who, according to Morales, went to the office and was introduced to Aronowitz. The record fails to establish whether this meeting took place before or after he was hired as Morales' assistant. According to Morales, Padilla requested his own paycheck from the Employer, and as a result of this request, Padilla was paid in that fashion for several months. Then, Aronowitz began paying Padilla through Morales and Padilla, who did not like that arrangement, left the job. Sometime in mid-1998 Morales hired Roberto for the position. Aronowitz continued his prior practice of issuing two separate checks payable to Morales.

Morales testified that sometime in 1998 he learned that Local 32E had once represented employees in the building and became interested in joining that union. He contacted Local 32E, who filed a petition with the New York State Employment Relations Board. The Employer's collective-bargaining agreement with Local 187 was raised as a bar to the processing of the Union's petition. It was after this, according to Morales, that the two checks previously issued to cover the building payroll became condensed into one: Morales now received one paycheck for a total amount of $360.[6]

The record establishes that Roberto is primarily responsible for cleaning the building and the adjacent sidewalk. He is also hired from time to time, on a per-job basis, to paint, clean out apartments or assist a contract handyman who is hired to make repairs to the building. He works at the facility on a daily basis. He has also received and signed for deliveries and acted as witness on behalf of the Employer at an eviction proceeding. When EK took over managing the building in February 1999, Roberto was introduced to Eisenstein as the building's porter and for a period of approximately six weeks, EK paid him separately, with a check issued in his own name. According to

[6] The record is not entirely consistent on this point, however. Copies of certain paychecks introduced into evidence demonstrate that as early as June 1997 (or prior to the 32E petition), Morales received a combined check and as late as June 1998 Morales received two separate

Eisenstein, this was doe in error. Pursuant to instructions from Aronowitz, EK began issuing weekly checks in the amount of $360 to Morales.[7]

The record establishes that Eisenstein and his partner, Katz, visit the facility periodically and have issued instructions to Roberto from time to time, primarily relating to the maintenance of the premises.[8] In addition, Roberto assisted in cleaning and rehabilitating the building after a recent fire. According to Roberto, he has on occasion called the EK office to advise them of problems with the building's compactor or when supplies are needed. Eisenstein testified that, due to family problems, Morales is often absent from the facility and he has arranged with Roberto to cover for him during his absences. While Eisenstein indicated that he permits this arrangement, he stated that he is not particularly happy with it. Eisenstein acknowledged that Roberto has accepted deliveries for the building in his brother's absence, but testified that he is not authorized to do so.

The Employer does not dispute that Morales is its employee or an employee within the meaning of the Act. Further, the Employer contends that Roberto Morales was never hired as an employee of the building and, at best, is only a casual employee who was hired by his brother to assist him. Thus, the Employer urges, inasmuch as the proposed unit is comprised of only one employee, the petition must be dismissed. The Union, conversely, contends that Roberto is an employee of the building and appropriately included within the proposed bargaining unit. Based upon the record

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checks, both made out to him. Morales was unable to testify as to exactly when the proceedings before the NYSERB took place, although he did testify that it was warm outside.

[7] Morales additionally testified some time ago he spoke with Eisenstein requesting that Roberto and he each receive their own check for tax purposes. Eisenstein stated that he would look into it, but hasn't given Morales an answer yet.

[8] For example, Roberto testified that Katz instructed him to spray the ground with disinfectant after a sanitation pick-up, to clean and oil the elevator and to pick up garbage. Eisenstein acknowledged that he "mentioned" to Roberto that the elevator was dirty and smelly.

before me, in agreement with Petitioner, I conclude that Roberto is an employee of the Employer and properly included in the proposed unit.

The evidence establishes that Morales initially received authorization to obtain the services of a porter from Aronowitz, and did not do so on his own initiative. Moreover, it is clear from the record that, notwithstanding the actual method of payment, the Employer has always maintained an itemized allowance for such services. Further, the porter is paid for his services by a check issued by the Employer. The record further establishes that Roberto has acted as an agent for the Employer with outside vendors, and neither he nor Morales have ever been instructed that he is not authorized to do so. Rather, it appears that the Employer relies upon Roberto's presence in the conduct of the building's affairs, particularly in his brother's absence. Moreover, the unrebutted record testimony establishes that Roberto is supervised by Eisenstein and Katz in the course of his duties, and that he communicates with them when the building requires supplies or repair. In this regard I note that EK apparently found evidence of Roberto's employee status sufficiently convincing to warrant separate compensation until instructed otherwise. Although the check is not issued to the porter by the Employer personally, such indirection does not negate the undisputed fact that the payment for employment made by the Employer is intended solely for the porter as compensation for services rendered in the Employer's building. Conversely, other than routine job directives, the record fails to establish that Morales has any significant control over the terms and conditions of Roberto's employment or the manner in which he is compensated. The relationship between Morales and Roberto appears lack any indicia that would indicate that Morales is the employer of the porters. Thus, because Roberto receives compensation and overall supervision from the Employer, and is relied upon to act as its agent, I find that he is an employee of the Employer. See generally *Roadway Package System, Inc*., 326 NLRB No. 72 (1998); *Dial -A-Mattress Operating*

Corporation, 326 NLRB No. 75 (1998) (common-law agency test applied to determine employee status).

Based upon the record, I find that the following unit is appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:[9]

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[9] Although not specifically urged by the Employer, I have considered the issue of whether Morales possesses supervisory authority, as defined by the Act. Section 2(11) of the National Labor Relations Act defines a supervisor as follows:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well-established that Section 2(11) of the Act must be read in the disjunctive and, therefore, an individual need possess only one of the enumerated criteria to find that such status exists. *Concourse Village, Inc*., 276 NLRB 12 (1985). However, this grant of authority must encompass the use of independent judgment on behalf of management. *Hydro Conduit Corp*., 254 NLRB 433, 441 (1981). The party alleging supervisory status bears the burden of establishing that such status, in fact, exists. *Ohio Masonic Home, Inc*., 295 NLRB 390, 393 fn.7 (1989). Mindful that a finding of supervisory status removes an individual from the protection of the Act, the Board avoids attaching to Section 2(11) too broad a construction. *Adco Electric, Inc*., 307 NLRB 1113, 1120 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993). The Board has noted that, in enacting Section 2(11) of the Act, Congress stressed that only persons with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen…And other minor supervisory employees." *Chicago Metallic Corp*. 273 NLRB 1677 (1985)(citing Senate Rep. No 105, 80th Cong., 1st Sess., 4 (1947), aff'd in releant part 794 F.2d 527 (9th Cir. 1986). Thus, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). In the instant case, while the record establishes that Morales testified that he hired the three porters who worked at the building, his unrebutted testimony demonstrates that Aronowitz viewed the selection of Morales' assistant as a routine matter, one in which he did not wish to be involved. In fact, Morales testimony establishes that, having difficulty obtaining a replacement for Pecada, he requested that Aronowitz do so. Morales was instructed to find someone on his own.

In *J.R.R. Realty Co*., 273 NLRB 1523 (1985), the Board found that a superintendent who testified that he "hired" a porter was not a supervisor as that term was contemplated by the statute:

> Although the “hiring” of an employee is often a dispositive indicator of supervisory status, the “hiring”, just like any other indicium of supervisory status, must reflect some meaningful measure of independent judgment. Thus, an individual may ‘hire” an employee in the colloquial sense, yet not be a supervisor within the meaning of the Act, if the “hiring” individual is merely performing a ministerial act or carrying out the directions of another who actually possesses the necessary authority (citations omitted).

All full time and regular part time building service employees employed by the Employer at its facility located at 595 East 170th Street, Bronx, New York excluding guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.[10] Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which

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Of significance to the Board in that case was the fact that no party was then urging that the superintendent therein be deemed a supervisor. Similarly, in the instant case I find that Morales, in the exercise of his "hiring" authority, was merely carrying out the instructions of Aronowitz, who declined to involve himself in the selection. Inasmuch as the record appears to establish that this was a routine, ministerial act and noting that the Employer has not raised the issue of Morales' supervisory status, I find that the evidence fails to support a conclusion that he is a supervisor within the meaning of the Act.

[10] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least three full working days prior to 12:01am on the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior top 12:01am of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

commenced more than 12 months before the election date and who have been permanently replaced.[11] Those eligible shall vote on whether or not they desire to be represented for collective-bargaining purposes[12] by Local 32E, Service Employees International Union, AFL-CIO.[13]

Dated at New York, New York
November 24, 1999

Daniel Silverman (s)
Daniel Silverman
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Rm. 3614
New York, New York 10278

Code 177-2414-2200
347-8040

[11] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear*, *Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (l969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on **December 1, 1999**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

[12] As noted above, the record demonstrates that the Employer presently is a party to a collective-bargaining agreement with Factory and Building Employees Union, Local 187 which covers certain of its employees. Although receiving notice of the instant proceedings, no representative of Local 187 appeared or sought to intervene in this matter. Accordingly, Local 187 must advise the Region, in writing, within seven (7) days of the date of this Decision should it wish to appear on the ballot in the election conducted herein. Should Local 187 desire to appear on the ballot, those eligible to vote shall vote on whether they wish to be represented by Local 32E, Service Employees International Union, AFL-CIO, the Factory and Building employees Union, Local 187 or neither labor organization.

[13] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 Fourteenth St., NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by **December 8, 1999**.